NO. 90-1261

MAR 10 1991

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

FRED QUAVE,

Petitioner

VERSUS

PROGRESS MARINE, Employer
(DOLPHIN TITAN INTERNATIONAL, INC.)
AMERICAN HOME ASSURANCE COMPANY
c/o AMERICAN INTERNATIONAL
ADJUSTMENT COMPANY

Cross-Petitioners

CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CROSS-PETITIONERS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Lance S. Ostendorf (10271)
Counsel of Record
Kathleen K. Charvet (1760)
McGLINCHEY, STAFFORD,
CELLINI & LANG
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200
Attorneys for Cross-Petitioners,
Progress Marine and American
Home Assurance Company c/o
American International
Adjustment Company

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

Petition Number 90-1261 presents the following question:

Whether Federal Rule of Civil Procedure 6(a) applies to Section 914(f), the penalty provision of the Longshore and Harbor Workers' Compensation Act?

LIST OF PARTIES

The following are the parties to this proceeding:

Fred Quave
Plaintiff-Petitioner

Progress Marine (Dolphin Titan International, Inc.)
Defendant-Cross-Petitioner

American Home Assurance Company c/o
American International Adjustment Company[1]
Defendant-Cross-Petitioner

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[1] American International Group is the parent company of American Home Assurance Company and American International Adjustment Company; American Home Assurance Company has one subsidiary that is not wholly owned, AIG Realty, Inc.: American International Adjustment Company has no subsidiaries that are not wholly owned.

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JURISDICTION

Petitioner, Fred Quave ("claimant"), instituted this action in the United States District Court for the Eastern District of Louisiana for enforcement of a supplemental compensation order, invoking that court's jurisdiction under 33 U.S.C. § 918. In the proceedings below, the federal district court issued a judgment, dated September 12, 1989, finding that payment of compensation had been timely made and no penalty was due, thus refusing to enforce the compensation order; the district court issued an amended judgment, dated October 26, 1989, awarding prejudgment interest and attorney fees.

On cross-appeals, the United States Court of Appeals for the Fifth Circuit rendered an opinion on September 24, 1990, and an opinion on rehearing on November 14, 1990 and denial of panel rehearing and *en banc* rehearing on December 11, 1990, affirming the district court.

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

The cross-petitioners are also seeking review of the Judgment of the United States Court of Appeals in a cross-petitioner for a writ of certiorari timely filed pursuant to Rule 13.5 of the Rules of the Supreme Court of the United States.

This brief in opposition is filed pursuant to Rule 13.2 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

The petitioner in this case is a claimant (hereinafter referred to as "claimant") seeking Longshore and Harbor Workers' Compensation act benefits (by virtue of the Outer Continental Shelf Lands Act) against Progress Marine and American Home Assurance Company, employer/carrier (hereinafter referred to as "employer/carrier"). The claim is currently pending before the United States Department of Labor. 33 U.S.C. § 922.

Prior to the current proceedings, the claim for benefits had been remanded to the Office of Administrative Law Judges for determination of the nature and extent of disability.

On December 2, 1987 an Administrative Law Judge issued a Decision and Order on Remand awarding benefits to claimant for permanent partial disability. The Administrative Law Judge's Order contained a finding as to claimant's loss of wage earning capacity, and thus the amount of compensation due the claimant, as follows:

> Therefore, I find that claimant's earning capacity as of September 5, 1978 to be $106.00 per week. Claimant's permanent partial disability benefits shall be paid accordingly. In computing the claimant's benefits, his earning capacity shall be adjusted to reflect the increases in minimum wage since 1978. This matter can be handled by the Deputy Commissioner. [Footnote omitted]. (R. at pp. 308-309).

Specifically, the Administrative Law Judge provided in his order that: "The specific dollar computations of the compensation award *shall be administratively performed by the Deputy Commissioner.*" (R. at P. 310). (Emphasis added).

On December 2, 1987, the Decision and Order on Remand was filed with the Deputy Commissioner, Office of Workers' Compensation Programs. The Decision and Order was then mailed to all parties and counsel of record. The Deputy Commissioner did not provide calculations of the awarded benefits although required by the Administrative Law Judge to perform the specific dollar computations. However, upon receipt of the Decision and Order mailed by the Deputy Commissioner, the employer/carrier estimated the disability benefits due and owing to the claimant as provided by the award of December 2, 1987, plus post-judgment interest. The carrier then issued a check for $90,002.47 payable to the claimant. The carrier deposited the compensation payment in the United States Mail on December 11, 1987, within the ten (10) day time period set forth in Section 14(f). This date of mailing, December 11, 1987, was stipulated to by counsel for claimant. (R. at p. 286).

Subsequently, the claimant requested a default order and the imposition of a twenty percent penalty for alleged underpayment of compensation and alleged untimely payment of compensation by the employer/carrier. Specifically, the claimant contended that he was due additional benefits greater than those already paid by the employer/carrier. Moreover, the claimant contended that because he did not receive the compensation payment until December 15, 1987 he was entitled to an additional twenty percent penalty. The employer/carrier controverted the claimant's entitlement to a default because there was no underpayment; employer/carrier contested the claimant's entitlement to this twenty percent penalty based upon the mailing of the compensation check within the ten (10) day time period.

As aforementioned, there was no fixed amount of past due benefits or continuing weekly benefits established

in either the Decision and Order of the Administrative Law Judge or in the form letter transmitting the Decision and Order by the Office of Workers' Compensation Programs. (R. at p. 310 and p. 298). In fact, there were no calculations prepared by the Deputy Commissioner until October 27, 1988 which, when finally calculated, were incorrect. (R. at p. 285).

The employer/carrier was notified of claimant's allegations that there was an underpayment, and that the past due compensation check had been paid late on October 27, 1988. The employer/carrier set forth its position that it had paid the correct amount of compensation on a timely basis. Additionally, it was the position of the employer/carrier that the Deputy Commissioner should not be permitted to assess a default or impose a penalty until the amount of the award was computed as ordered by the Administrative Law Judge. Eventually, this was accomplished (incorrectly) ten months after the Deputy Commissioner filed the Decision and Order. Even then, the Deputy Commissioner failed to adjust the compensation rate to reflect the increase in minimum wage as required by the Decision and Order. Despite the failure of the Deputy Commissioner to perform the calculations correctly as ordered by the administrative law judge within the ten day time period, she issued a supplementary default order.

The proceeding in the district court ensued wherein the claimant sought to enforce the supplementary compensation order declaring default issued by the Deputy Commissioner. (R. at pp. 287-289). The supplementary default order was based on the erroneous computations prepared on October 27, 1988. The supplementary compensation order, dated March 22, 1989, contained a finding by the Deputy Commissioner that the employer/carrier was in default in the amount of $7,065.49 for the past due

benefits. Additionally, the Deputy Commissioner ordered the employer/carrier to pay a twenty percent penalty based upon the total amount of compensation owed plus interest due to untimely payment beyond the ten (10) day time period.

On May 5, 1989, claimant filed an "Application for Entry of Judgment Pursuant to the United States Code 33 § 918" seeking to enforce the supplemental compensation order declaring default issued by the Deputy Commissioner. Progress Marine and American Home Assurance Company filed a Motion to Dismiss Claimant's Application for Entry of Judgment. The employer/carrier's Motion was granted with written reasons in a Minute Entry of September 8, 1989 and Judgment signed by the district judge on September 11, 1989.

Subsequently, claimant filed a Motion for New Trial and the district court amended its previous judgment, awarding claimant pre-judgment interest for the period December 2, 1977 through December 14, 1987 on the award of temporary total disability benefits, as well as pre-judgment interest from September 5, 1978 to December 14, 1987 on the award for permanent partial disability benefits. The amended judgment was signed by the district judge on October 26, 1989.

Claimant's counsel then submitted an application for attorney's fees to the district court for services rendered pursuant to the enforcement of judgment proceeding. The district court granted a partial award for attorney's fees and disallowed the remainder of the attorney's fees claimed.

Both claimant and employer/carrier filed appeals to the United States Court of Appeals for the Fifth Circuit which affirmed the district court.

The claimant then filed a petition for a writ of certiorari on the issue of timely payment.

SUMMARY OF ARGUMENT

The courts below had jurisdiction to determine that the supplemental compensation order declaring default was not in accordance with law and was not accurate as to the amount in default as required by 33 U.S.C. §918. The district judge correctly held that the Deputy Commissioner failed to calculate the precise amount of claimant's benefits as required by the decision and order awarding benefits. Accordingly, the district court found that the employer/carrier paid the appropriate amount of past due benefits to claimant and did not owe the additional $7,065.49 in past due compensation.

The district judge and court of appeals correctly interpreted the applicable provisions of the Longshore & Harbor Workers' Compensation Act *in pari materia* with the pertinent time computations of the Federal Rules of Civil Procedure, pursuant to Rule 81(a)(6). The courts below properly interpreted Section 914(f) of the Longshore and Harbor Workers' Compensation Act in conjunction with Rule 6(a). Thus, the courts correctly determined that the employer/carrier had made timely payment of compensation and therefore the employer/carrier was not subject to the imposition of the twenty percent penalty.

Alternatively, the employer/carrier argue that payment was timely made to the claimant in that the mailing of the benefits check was actually accomplished within the ten (10) day time limitation. Employer/Carrier urge that the requisite provision of the Longshore & Harbor Workers' Compensation Act, Section 914(f), was satisfied by date of mailing, December 11, 1987, a date which is stipulated to by all parties. Employer/Carrier posit that the appropriate analysis for "payment" and "delivery" is date

of mailing to the employee, not the date of receipt by the employee. The employer/carrier rely upon the well-established commercial principle that date of mailing is equivalent to constructive delivery.

ARGUMENT

I. The Question Presented Does Not Merit Review.

The question raised by Petitioner does not merit review nor does Petitioner articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support his argument that this court should exercise its discretionary power of review. Rule 10 implies that there must be a substantial federal question presented to warrant the granting of certiorari. The question presented by Petitioner relates solely to a procedural issue of applying the Federal Rules of Civil Procedure to proceedings arising under the Longshore and Harbor Workers' Compensation Act. The decision of the Court of Appeals does not conflict with a decision of this court or of another Federal Circuit Court of Appeals, nor has the Court of Appeals decided a federal question in a way which conflicts with a state court of last resort. There is no evidence that the Court of Appeals has "departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" so as to warrant an exercise of this court's power of supervision.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties" and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux Memorial Park Cemetery,* 349 U.S. 70 (1955). The Petitioner has failed to demonstrate that any of the reasons set forth above are present in the instant case. Petitioner

is merely dissatisfied with the outcome of the decision as it affects him as a litigant and is now attempting to reargue the case which was dismissed by the District Court and affirmed by the Circuit Court of Appeals.

II. The Courts Below Correctly Applied Federal Rule of Civil Procedure 6(a) to the Longshore and Harbor Workers' Compensation Act in Determining That Compensation Was Timely Paid.

A. The Deputy Commissioner improperly assessed Section 914(f) penalties.

The district judge properly found that the Deputy Commissioner incorrectly calculated the amount of benefits and failed to follow the mandate established in the decision and order awarding benefits of the Administrative Law Judge to calculate a fixed amount of benefits. In fact, there were no calculations or computations of any kind prepared by the Deputy Commissioner until October 27, 1988, nearly one year after the filing of the decision and order. Even then, the Deputy Commissioner failed to adjust the compensation rate to reflect the increases in minimum wage as required by the Decision and Order. (R. at pp. 283-285).

Essentially, the Administrative Law Judge rendered an order requiring the Deputy Commissioner to perform the administrative function of computing the amount of the award but failed to provide a method to perform the mathematical calculations. In the supplemental compensation order issued by the Deputy Commissioner, dated March 22, 1989, the Deputy Commissioner found that compensation was due pursuant to the Decision and Order of the Administrative Law Judge filed December 2, 1987 as follows: "Permanent partial disability at $194.32 per week." (R. at p. 314). At that time, the employer/carrier

opposed the supplemental compensation order on the basis that all appropriate amounts of past due compensation had been paid to claimant pursuant to the Decision and Order filed December 2, 1987. The employer/carrier also contended that the supplemental order declaring default was incomplete and incorrectly calculated by the Deputy Commissioner.

The district judge correctly determined, as permitted by his scope of review of such orders, that the Deputy Commissioner failed to perform the calculations pursuant to order. *See In the Matter of the Claim for Compensation Under the Longshore and Harbor Workers' Compensation Act; Abbott v. Louisiana Insurance Guarantee Association,* 889 F.2d 626 (5th Cir. 1989); se also *Severin v. Exxon Corp.,* 910 F.2d 286 (5th Cir. 1990). Additionally, the courts below properly held that the Deputy Commissioner incorrectly calculated the default.

Specifically, the Administrative Law Judge provided that: "The specific dollar computations of the compensation award *shall be administratively performed by the Deputy Commissioner.*" (Emphasis added). The Administrative Law Judge also ordered that the claimant was entitled to compensation for permanent partial disability "with the claimant's earning capacity to be periodically adjusted to reflect the increase in minimum wage. (R. at p. 310).

As aforementioned, the Decision and Order directed the Deputy Commissioner to adjust the compensation rate to reflect the increased minimum wage over the period of claimant's alleged disability. The district court correctly found that the Deputy Commissioner's supplemental compensation order failed to follow the directive of the Administrative Law Judge in that the minimum wage remained constant for the purposes of the calculations, and thus the Deputy Commissioner's supplemental compensation

order was incorrectly calculated and not made in accordance with law. As such, the supplemental default order was unenforceable. 33 U.S.C. §918(a). *Severin v. Exxon Corp.*, 910 F.2d 286 (5th Cir. 1990).

The Court below correctly found that the Deputy Commissioner erroneously used the 1978 minimum wage as a constant for the calculation of the permanent partial disability award from 1978 to the present time. Thus, the supplemental compensation order failed to track the decision and order awarding benefits as rendered by the Administrative Law Judge; it is violative of Section 918 due to the incorrect calculations. Since the supplemental compensation order was not issued in accordance with law, Section 914(f) is not applicable and cannot be assessed until the correct amount of compensation ultimately due is determined by the Deputy Commissioner. *Severin v. Exxon*
Corp., 910 F.2d 286 (5th Cir. 1990). In *Severin,* the Court of Appeals for the Fifth Circuit held that a supplemental default order erroneously entered by the deputy commissioner was not "in accordance with law" and therefore enforceable pursuant to Section 918(a). See also *Lawson v. Atlantic and Gulf Grain Stevedores Company,* 12 BRBS 767 (1980).

In the instant case, the district court reviewed the alleged underpayment and compared the figures with those calculations performed by Kenneth Boudreaux, Ph.D. The district court determined that all appropriate amounts of compensation were paid, that there were no underpayments, and thus pretermitted a further finding of default. Therefore, the district court was correct in not giving any effect to the supplemental compensation order issued by the Deputy Commissioner as to the alleged underpayment of past due compensation benefits.

B. Compensation was Timely Paid.

In the supplemental compensation order dated March 22, 1989, the Deputy Commissioner found that the employer/carrier failed to pay compensation timely as required by 33 U.S.C. §914(f) and thus owed the claimant additional money by the imposition of a twenty percent penalty. The courts below correctly found that the employer/carrier were not subject to the imposition of such a penalty by the Office of Workers' Compensation Programs. The courts below found that timely payment of compensation had been made.

Section 914(f) provides as follows:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in §21 and an order staying payments has been issued by the Board or court.

The chronology of filing and payment is significant. The decision and order of the Administrative Law Judge was filed by the Deputy Commissioner with the Office of Workers' Compensation Programs on December 2, 1987. Compensation was due to the claimant pursuant to the order within ten days of filing.

Notice No. 42 of the Office of Workers' Compensation Programs extends the ten (10) day period pursuant to Federal Rules of Civil Procedure Rule 6(a). (R. at p. 290). In the instant case, the carrier deposited the compensation

payment in the U. S. Mail on December 11, 1987, a date which is stipulated to by all parties to this proceeding. Claimant received the check within the time period allowed by Notice No. 42 and Rule 6(a).

The district court and court of appeals properly held that the Federal Rules of Civil Procedure are made applicabale to the Longshore and Harbor Workers' Compensation Act by Rule 81(a)(6). Specifically, Rule 81(a)(6) provides that the Federal Rules of Civil Procedure "apply to proceedings for enforcement or review of compensation orders under the Longshoremen's [sic] and Harbor Workers' Compensation Act. . .except to the extent that matters of procedure are provided for in that act. . . ." The courts below correctly pointed out that there is no provision in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, which provides a method by which the ten (10) day time limitation in 33 U.S.C. §914(f) should be calculated.

The district court and court of appeals then correctly reasoned that Federal Rule of Civil Procedure 6(a) becomes the applicable method by which the ten (10) day time limitation is to be calculated. Federal Rule of Civil Procedure 6(a) provides, in pertinent part, that when a period of time prescribed by statute is less than eleven days, intermediate Saturdays and Sundays shall be excluded in computing the applicable time limitation. In the instant case, when the intermediate Saturdays and Sundays are excluded from the time period of Wednesday, December 2, 1987 (the date claimant's compensation payment became due) to Tuesday, December 15, 1987 (the date claimant received his compensation payment), it becomes clear that claimant timely received his payment. The district judge stated that his ruling was based on principles of uniformity, i.e. applying Rule 6(a) to the Longshore and Harbor Workers' Compensation Act conforms with the application

of the Federal Rules to other federal statutes. The district judge also considered public policy, i.e. there is no prejudice or inconvenience which results in the application of such time computations. The court of appeals relied upon the underlying philosophy of Rule 81(a)(6) which essentially sets forth the premise that the Federal Rules of Civil Procedure are applicable to LHWCA matters except to the extent the statute specifically provides for procedures.

Moreover, the district court below properly distinguished the series of Administrative Law Judge and Benefits Review Board decisions wherein the ten (10) day limit was calculated without excluding intermediate Saturdays and Sundays. As the district court pointed out, all of these decisions were decided prior to 1985. Prior to 1985, the pertinent provision of Rule 6(a) provided that intermediate Saturdays and Sundays could be excluded only if the time limitation was less than seven days. Thus, the district court properly rejected the claimant's assertion that Rule 6(a), as a general rule, is inapplicable to Section 914(f) of the Longshore and Harbor Workers' Compensation Act. Rather, the court emphasized that prior to 1985, the time limitation prescribed by Section 914(f) did not fall within the scope of that version of Rule 6(a).

Moreover, the district court and court of appeals determined that the holding of *Lauzon vs. Strachan Shipping Company*, 782 F.2d 1217 (5th Cir. 1985) was readily distinguishable from the instant case. As noted, the Fifth Circuit specifically declined to reach the issue regarding the "general applicability of the Federal Rules of Civil Procedure to Section 914(f) assessments. . . ." *Lauzon*, 782 F.2d at 1220. Accordingly, the district court and court of appeals properly held that in some instances, the Federal Rules of Civil Procedure, and Rule 6(a) in particular, are applicable to the time limitation of Section 914(f). *See Wright and Miller, Federal Practice and Procedure:* Civil 2d, §1163.

Moreover, employer/carrier submit that the Courts below need not have reached the issue of the applicability of Federal Rules of Civil Procedure, Rule 6(a). Specifically, the employer/carrier suggest that the compensation payment was timely paid in that it was made by the usual and customary practice of depositing same in the United States Mail, Express Mail, within the ten (10) day time period allowed by 33 U.S.C. §914(f).

None of the provisions of the Longshore and Harbor Workers' Compensation Act, provide direction for determining when payment has been made. However, section 930(d) states as follows:

> The mailing of any such report and copy in a stamped envelope, within the time prescribed in Subdivision (a) or (b), through the secretary and Deputy Commissioner, respectively, shall be a compliance with this section.

The employer/carrier suggest that this provision of the Longshore and Harbor Workers' Compensation Act embodies an intent to adopt commercially recognized methods of mailing.

The decision of *Seward vs. Marine Maintenance of Texas, Inc.*, 13 BRBS 500 (B.R.B. 1981), is an analogous case and provides guidance in the instant case. In *Seward*, the Benefits Review Board determined that the Deputy Commissioner improperly imposed an additional assessment of compensation under Section 914(f) where a draft was delivered to the claimant within ten days after compensation became due, but use of the funds was delayed for more than ten days due to a banking procedure. The Benefits Review Board relied upon common-law commercial transactions in upholding the "relation-back doctrine"

to comply with the definition of payments under the Act. *See Duke v. Sun Oil Co.*, 320 F.2d 853 (5th Cir. 1963).

Since there is no specific provision in the Longshore and Harbor Workers' Compensation Act or in the regulations which defines the terms of payment, this Court should look to accepted methods of commercial transactions, i.e. date of mailing is equivalent to date of payment. Otherwise, as the *Seward* court noted, employers and/or carriers would have to resort to direct payment in cash as the only means to avoid the Section 914(f) penalty. This would be commercially impractical, especially considering that claimants (such as those covered under the Longshore and Harbor Workers' Compensation Act as extended by the Defense Base Act, 42 U.S.C. §1651(a), *et seq.*) reside all over the world. It is an impossible burden to place upon the employer/carrier to make payment in hand within the ten (10) day time period set forth in Section 914(f) unless the employer/carrier is permitted to rely upon the date of mailing as the date of payment.

In the instant case, payment as contemplated by 33 U.S.C. §914(f) was made within 10 days of the compensation order. The date of payment of compensation should be construed as the date of mailing, i.e., December 11, 1987, within the ten (10) day time period.

Thus, the imposition of the twenty percent penalty provision by the Deputy Commissioner, Office of Workers' Compensation Programs was properly vacated by the courts below.

CONCLUSION

Employer/Carrier submit that the courts below properly found the Deputy Commissioner's supplemental order contained errors of fact and was not issued in accordance with law. 33 U.S.C. § 918(a); *Severin v. Exxon Corp.*, 910 F.2d 286 (5th Cir. 1990). Thus, claimant's motion to enforce the supplemental order was properly dismissed. Moreover, compensation was paid timely to the claimant pursuant to Federal Rule of Civil Procedure 6(a) as set forth in Section 914(f).

Respectfully submitted,

LANCE S. OSTENDORF (10271)
KATHLEEN K. CHARVET (1760)
McGLINCHEY, STAFFORD,
CELLINI & LANG
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200
Attorneys for Progress Marine and
American Home Assurance Company c/o
American International Adjustment
Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record, by depositing same in the United States mail, properly addressed, and postage prepaid, this ____ day of _____, 1991.

_____

KATHLEEN K. CHARVET